NO. 88-715

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER 1988 TERM

FORREST H. BURLESON,

Appellant

vs.

JACQUELINE D. BURLESON,

Appellee

--oOo--

On Appeal from the Court of Appeal
of California
Third Appellate District

OPPOSITION TO MOTION TO DISMISS THE APPEAL

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February 9, 1989

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Appellant respectfully files opposition to Appelle's the motion to dismiss as follows:

I: THE QUESTION OF CHARACTERIZATION OF PAY HAS BEEN DETERMINED BY THIS COURT TO BE A FEDERAL QUESTION:

This Court has already decided that the question is a federal question; it simply deferred answering this question to another day, McCarty v. McCarty (1981) 453 U.S. 210, 69 L. Ed. 2d 589, 600:

> "Having said all this, we need not decide today whether federal law prohibits a State from characterizing retired pay as deferred compensation..."

The Former Spouses Protection Act has not manifested or conferred any jurisdiction upon State courts to contradict over 100 years of federal case and statutory law wherein the pay is continuously characterized and defined as "wages".

As the United States

Comptroller General stated in correspondence [unpublished case number B-221190: In the Matter of LT. COL. William A. Smith, Jr. USA (retired)], of which judicial notice was taken in this case,

"As to Colonel Smith's suggestion that military retired pay is current compensation rather than a pension for past services, we note that the [Former Spouses Protection] Act in no way redefines retired pay but merely allows state courts to treat this current compensation as divisible property if permissible under state law," (emphasis added).

Under California law, the current compensation of any party in a divorce action is NOT within the jurisdiction of the court and is NOT a divisible asset, Lang v. Superior Court, 153 C.A. 3d 510 (1984); California Rules of Court, Rule 1212; Tilghman v. Superior Court 40 Cal. 3d 599 (1974); Johnson v. Johnson (1963) 214 C.A. 2d 29; California Civil Code §§ 5110-5118.

The division is accomplished under California law IF AND ONLY IF the pay is REcharacterized as a pension or deferred compensation benefit, In re Fithian 10 Cal. 3d 592 (1974); In re Marriage of Brown 15 Cal. 3d 838 (1976); Henn v. Henn 26 Cal.3d 323 (1980); Casas v. Thompson 42 Cal. 3d 131 (1986).

The argument here is NOT about WHAT is a divisible asset under California law; the argument is about California courts redefining federal property [McCune v. Essign (199 U.S. 390 (1905); reversing State court distribution of federal property contrary to federal law], invading powers exclusively delegated to Congress by the Constitution [Knickerbocker Ice Co. v. Stewart 253 U.S. 149 (1923)], and ignoring stare decisis of this Court in excess of State court jurisdiction,

[Auto Equity Sales v. Superior Court 57 Cal. 2d 450 (1962)].

Appellant contends the State courts are preempted from recharacterizing the pay as a pension because such characterization defeats and destroys the federal statutory schema, McCarty v. McCarty, supra, 453 U.S. 200 [reaffirming that the pay is wages and a personal entitlement to the military member].

II: THE FEDERAL QUESTIONS ARE NOVEL:

A: WHETHER STATE COURTS MAY RECHARACTERIZE THE PAY AS DEFERRED COMPENSATION IS SETTLED TO BE AN UNANSWERED FEDERAL QUESTION:

In 1981, this Court framed (but did not answer) the question -- Are State courts preempted from REcharacterizing the retainer pay in a manner conflicting with and destructive to the federal statutory schema? McCarty v. McCarty, supra, 453 U.S. 210, 69 L. Ed.

2d 598, 600.

Based upon the framing of this and the companion question of preemption of State courts dividing the pay regardless of the characterization, this Court ruled:

"We have now concluded that this case properly falls within our appellate jurisdiction, and we therefore proceed to the merits," McCarty v. McCarty, supra, 453 U.S. 210, 69 L. ed. 2d 589, 598.

This Court further noted in McCarty:

"Appellant correctly notes that military retired pay differs in some significant respects from a typical pension or retirement...These factors have led several courts, including this one, to conclude that military retired pay is reduced compensation for reduced current services. In United States v. Tyler, 105 U.S., at 245, 26 L. Ed. 985, the Court stated that retired pay is 'compensation...continued at a reduced rate and the connection is continued, with a retirement from active duty service only.'"

Appellant's jurisdictional statement clearly sets forth case law

sufficient to establish the continuing holdings of this and other inferior federal courts that reaffirm the ruling of this Court in United States v. Tyler, supra, 105 U.S. 243; to wit, military retainer pay is NECESSARILY current pay and NOT deferred compensation.

The IRS publication, Circular E, Rev. Jan. 1989, states:

> "Since military retirement pay is generally considered as wages, and not as a pension or annuity, military retirees should give you a Form W-4 to request income tax withholding, not Form W-4P."

See also, Internal Revenue Code §3401(a); Employment Tax Regulations section 31.3401(a)-1(b)(11); Black's Law Dictionary [defining "pay" as "consideration" for their "personal services"].

Appellant seeks recognition and reaffirmation by this Court that the pay is current wages.

B: THE UNCONSTITUTIONAL DELEGATION BY CONGRESS OF A NON-DELEGABLE CONSTITUTIONALLY DUTY EXCLUSIVELY IMPOSED UPON CONGRESS IS RAISED AS A MATTER OF FIRST IMPRESSION WITH RESPECT TO MILITARY RETIRED PAY:

It is well settled that Congress is prohibited by the Constitution from delegating powers exclusively designated as Congressional powers, Knickerbocker Ice Co. v. Stewart (1920) 253 U.S. 149; Appellant raises this issue as a case of first impression to this Court regarding military retired pay. As this Court has already determined, nothing is more federal in character than the payment of salaries to raise military forces on behalf of the nation, United States v. Tarble (1872) 80 U.S. 397. The power to raise and support the military -- and to control the pay -- is exclusively delegated by the Constitution to Congress.

III: THE ASSET WAS NOT OMITTED:

The Property Settlement Agreement, which does not specifically name any property or asset, recites as follows:

> Each party has made a full disclosure to the other of his current finances and assets, and each enters into this agreement in reliance thereon.
>
> Husband and Wife agree to divide their property to their mutual satisfaction, and each hereby transfers and quit-claims to the other any and all interest in any property in the possession of the other, and agrees that whatever propperty the other may possess is now the sole and separate property of the other.

At time of trial in 1987, in the equity action, Appellee testified that she knew WHEN SHE ENTERED THE AGREEMENT that Appellant was then receiving military retainer pay. She voluntarily assigned any claim she had to Appellant in return for other benefits; her support (which amounted to 98% of his net pay) was based solely upon this income. -8-

IV: AT THE TIME OF SEPARATION, THE PAY WAS NOT DIVISIBLE:

The parties separated in 1973; at that time, the pay was not a divisible asset, In re Marriage of Fithian, 10 Cal. 3d 592 (1974), cert den. 419 U.S. 825, 42 L. Ed. 2d 48, 95 S. Ct. 41 (1974) [holding for the first time that the military retired pay was deferred compensation and, therefore, a community property asset]. At the time the parties were divorced (1975) the pay was being divided under California law. It was a disclosed asset and it was awarded to Appellant pursuant to the general clause whereby each party quit claimed to each other all property then in the other party's possession.

V: THE INTENTION OF CONGRESS WAS NOT TO PERMIT FINALJUDGMENTS TO BE REOPENED:

See Defense Budget Appropriation Bill, 1989.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court take jurisdiction and permit

attempts to clarify the fact that the Former Spouses Protection Act was NOT INTENDED BY CONGRESS to have any retroactive effect. In particular, it was NOT the intention of Congress to permit the reopening of any judgments final prior to June 25, 1981; specifically, it was not Congress' intention to permit cases wherein the pay was not mentioned to be relitigated.

CONCLUSION

This Court should take jurisdiction and permit this case to be heard on the merits.

Dated: February 9, 1989

Respectfully submitted,

LORETTA H. HELLEN,
Attorney at Law
3101 First Avenue
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Counsel for Appellant
FORREST H. BURLESON

CERTIFICATE OF SERVICE

I, LORETTA H. HELLEN, as a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of February, 1989, I served copies of the foregoing OPPOSITION TO MOTION TO DISMISS THE APPEAL on the several parties thereto, as follows:

1. The Attorney General of the State of California, 1515 K Street, Sacramento, CA. 95814.

2. The United States Attorney, 3305 Federal Building, 650 Capitol Mall, Sacramento, CA. 95814.

3. MINNA WILLIAMS, Attorney at Law, 320 4th Street, Marysville, CA. 95901 (Counsel for Appellee, Jacqueline D. Burleson).

As a result of the foregoing, all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct and executed this 10th day of February 1989 at Sacramento, California.

LORETTA H. HELLEN